CHIA HOCK SENG v. THOR KENG HONG & ORS.

[O.C.J. (Chang Min Tat J.) July 19, 1969]

[Penang — Originating Summons No. 142 of 1968]

Wills and Trusts — Construction of — "Lawful male issue" — Division of residuary estate.

In this application the surviving trustee sought for the construction of the will of one Thor Soo Saik, in particular for the determination of three questions whether upon a true construction and in the events that have happened: (a) Thor Keng Seng and Thor Keng Hock are the lawful male issue of Thor Teng Eng as defined under clause 10 of the will of the testator, (b) the nett residuary estate is to be divided among Thor Keng Hong, Thor Keng Seng and Thor Keng Hock equally, or (c) as to two shares to Thor Keng Hong and one share each for Thor Keng Seng and Thor Keng Hock.

Clause 10 of the will provides: "I declare that for the purpose of this my will the expressions 'lawful issue' 'lawful male issue' and 'lawful female issue' wheresoever used throughout my will and in any codicil hereto shall include — (i) children by the principal and secondary wives of either of my sons Thor Teng Eng and of my deceased son Thor Chye Huat and (ii) children adopted by either of them my said sons before my death and with my approval and (iii) male persons adopted when under two years of age (calculated according to the Gregorian calendar) by or to either of my said sons after my death with the joint approval of all of them my trustees and my daughters Thor Cheng Sim, Thor Cheng Liang and Thor Cheng Lye or such of them as may then be living at the date of adoption. But shall not in any event include children borne to either of my said sons by their respective mistresses if any."

Held: (1) in the construction of wills there is a *prima facie* rule of distribution *per capita* and not *per stirpes* but this rule can be displaced where circumstances warrant a construction in favour of distribution *per stirpes;*

(2) it is not necessary to resort to any rule of construction where the language used is so clear as not to be capable of another construction;

(3) the answer to the questions of the trustees are therefore: (a) Thor Keng Seng and Thor Keng Hock are the lawful male issue of Thor Teng Eng, within the meaning of clause 10 of the will and (b) the nett residuary estate is to be divided among Thor Keng Hong, Thor Keng Seng and Thor Keng Hock equally.

ORIGINATING SUMMONS.

Miss W. A. Goh for the plaintiff.

Ong Huck Lim for the 1st defendant.

S. Thillaimuthu for the 2nd & 3rd defendants.

Cur. Adv. Vult.

Chang Min Tat J.: In this application, the surviving trustee applies to court, *inter alia,* for construction of the will of Thor Joo Saik (hereinafter called the testator), in particular for the determination of three questions whether upon a true construction and in the events that have happened —

(a) Thor Keng Seng and Thor Keng Hock are the lawful male issue of Thor Teng Eng as defined under clause 10 of the will of the testator

(b) the nett residuary estate is to be divided among Thor Keng Hong, Thor Keng Seng and Thor Keng Hock equally or

(c) as to two shares to Thor Keng Hong and one share each for Thor Keng Seng and Thor Keng Hock.

This application was made necessary by the contention of Thor Keng Hong that Thor Keng Seng and Thor Keng Hock were not adopted in accordance with clause 10 of the testator's will and they were not therefore beneficiaries under the will and he was the sole surviving grandson of the testator and as such entitled to the whole estate.

At the hearing, it transpired that Thor Keng Hong was himself not a natural grandson but was himself an adopted son of Thor Chye Huat who had predeceased the testator. Nothing turns however on this as Thor Keng Hong was a named beneficiary in the will.

It will be convenient at this stage to set out the relevant provisions of the will:

"6. At the expiration of the trust period I direct that my trustees shall stand possessed of my residuary estate together with the accumulations of income if any accruing under clause 5 hereof *in trust* for my said grandson Thor Keng Hong and for all the lawful male issue then living of my son Thor Teng Eng in equal shares Provided that if my said grandson Thor Keng Hong be then dead and there shall be no lawful male issue of my said son Thor Teng Eng then living then in trust for my said son Thor Teng Eng absolutely and further provided that if my said son Thor Teng Eng shall die in my lifetime or before the expiration of the trust period without leaving lawful male issue living at the expiration of the trust period then in trust in equal shares for such male person or persons who shall be adopted after my death to each of my said sons Thor Teng Eng and Thor Chye Huat in accordance with the directions hereinafter contained in clause 9 with reference to the adoption of sons in the event of the deaths or other failures of all natural born sons and of sons adopted during my lifetime and with my approval.

9. I direct that in the event of the death or other failure to inherit of my son Thor Teng Eng and of all lawful male issue of either of my said sons Thor Teng Eng and Thor Chye Huat before the expiration of the trust period my trustees together with my said daughters Thor Cheng Sim, Thor Cheng Liang and Thor Cheng Lye or such of them as may then be living shall before the expiration of the trust period adopt to each of my said sons a male child of less than two years of age (calculated according to the Gregorian calendar) in order that the surname of Thor may be perpetuated and the customary filial duties of ancestral worship may be properly performed and that after such adoption male persons bearing the surname of Thor shall inherit my residuary estate.

10. I declare that for the purpose of this my will the expressions 'lawful issue' 'lawful male issue' and 'lawful female issue' wheresoever used throughout my will and in any codicil hereto shall include

(i) children by the principal and secondary wives of either of my sons Thor Teng Eng and of my deceased son Thor Chye Huat and

(ii) children adopted by either of them my said sons before my death and with my approval and

(iii) male persons adopted when under two years of age (calculated according to the Gregorian calendar) by or to either of my said sons after my death with the joint approval of all of them my trustees and my daughters Thor Cheng Sim, Thor Cheng Liang and Thor Cheng Lye or such of them as may then be living at the date of adoption

But shall not in any event include children borne to either of my said sons by their respective mistresses if any."

There were provisions for the payment of the income from the estate during the trust period, which extended for 21 years to 25th January 1966, but in my view these are of no importance except possibly for the inferences to be drawn therefrom. The testator died on 25th January 1947 without revoking or adding to this will, which he had made on 9th September 1946. From the genealogical table which was so thoughtfully compiled by counsel for the trustee and

which is so greatly appreciated and from the oral evidence in this case, the descent and the adoptions appear to be as follows: Neoh Poh In, the wife of the testator, left six natural children. In order of their births, they were Thor Cheng Baik, a daughter, who died in 1939, Thor Teng Eng, a son (of whom more anon), Thor Cheng Sim, a daughter, who died in September, 1966, Thor Cheng Liang, another daughter who married Chia Hock Seng and who with her husband were the joint trustees of the will, she dying in June, 1966, Thor Cheng Lye, a daughter still living and Thor Chye Huat who died in 1943. Neoh Poh In died on 7th September 1934. Thor Teng Eng, the elder of the 2 sons of the testator, married Cheah Cheng Imm in 1928, and Loh Ah Lian in 1948. Both his wives are still alive and survive him. He himself died on 22nd July 1959. He had a natural son by Cheah Cheng Imm but he died in 1929, i.e. before the testator's wife. Then in 1931, he adopted a girl Thor Bean Choo who, so far as I know, is still alive but who is not relevant in the matter of the inheritance of the residuary estate. In 1937, Thor Teng Eng adopted a son, to whom the name Thor Keng Eow was given. This boy died in 1944. In September, 1946, Thor Teng Eng adopted a boy Thor Keng Seng, who was born on 16th September 1946. This Thor Keng Seng was therefore adopted in the lifetime of the testator who died on 25th January 1947. A month after his death Thor Teng Eng adopted Thor Keng Hock. Shortly afterwards Thor Teng Eng removed Thor Keng Hock from Cheah Cheng Imm and put him in the care of Loh Ah Lian. The other son Thor Chye Huat married Yeoh Hun Eng and died in 1943 leaving him surviving his wife, Thor Keng Hong, an adopted son born in 1939 and a natural daughter Thor Guat Ee, who was born in the year of his death.

From the terms of the will, adopted grandsons inherit so long as they have been adopted in accordance with the provisions of clause 10 and since the adoptions of Thor Keng Seng and Thor Keng Hock are matters that go to the root of this determination, I propose to deal with these before I come to the interpretation of the will.

Though he contested the issue, Thor Keng Hong was obviously not in a position to know. In 1946-1947, at the time of the adoptions of Thor Keng Seng and Thor Keng Hock, he was a mere stripling of some 7 or 8 years. His father Thor Chye Huat was then dead. Whether his mother Yeoh Hun Eng knew or did not know, I am not advised. She was subpoenaed at the instance of counsel for the other two and made available but she was not called. An aunt, Thor Cheng Lye, was, at the hearing, still alive but she was said to be in poor health and bed-ridden. No application was made to have her evidence taken at her bed-side. As a matter of fact, Thor Keng Hong called no evidence whatsoever. He left it to the other two expectant beneficiaries to prove their cases but he did not call any evidence contra.

Mr. Thillaimuthu, counsel for Thor Keng Seng and Thor Keng Hock accepted the burden of proving the claim of his clients. The first witness he called was Cheah Cheng Imm, the widow of Thor Teng Eng. She produced the birth-certificates, so called, of the 2 boys. She frankly admitted that the certificates were false. The boys had been born to others but were given away in adoption at birth or so shortly afterwards that it was possible to register their births as being to Thor Teng Eng and Cheah Cheng Imm. An offence had undoubtedly been committed but it is not of importance for the application before me. The fact remained that the certificates were in my view the strongest evidence of the fact of adoption, the informant in each case being Thor Teng Eng himself. They were reinforced by the oral evidence not only of Cheah Cheng Imm but also Thor Chew Lim (P.W.2) the nephew of the testator who had all these years been closely associated with and was in fact brought up by him, and Chia Hock Seng (P.W.3), the son-in-law of the testator and his appointed trustee. Both were present or in a position to know of the adoptions at the time they were effected. Thor Chew Lim testified that the testator gave Thor Keng Seng to Thor Teng Eng as his son. The child was born in Serendah, Selangor but on the instructions of the testator, was brought to Penang by himself and Thor Cheng Liang. This statement was never challenged in cross-examination or by contrary evidence. Further, Chia Hock Seng testified that at the funeral of the testator, Thor Keng Seng was one of the mourners. Both witnesses also said that the two boys used to be brought back to the family house at No. 56 Jelutong Road, Penang, for important anniversaries and ancestral observances, in which they participated and that they were accepted as members of the household by the surviving sisters of Thor Teng Eng both in his lifetime and after his death. There is a discrepancy as to whether Thor Keng Seng was brought direct to 56 Jelutong Road or to 132 Irving Road, the residence of P.W.1, but in my view this discrepancy arose from a fault of recollection rather than from untruthfulness and did not brand the adoptions as untrue.

On the whole of the evidence, I therefore find that Thor Keng Seng was adopted with the approval of the testator before his death, i.e. in accordance with the provision of clause 10(ii) of his will and that Thor Keng Hock was adopted by Thor Teng Eng after the testator's death, however with the approval of the trustees and the surviving sisters of Thor Teng Eng, i.e. in accordance with the provision of clause 10(iii) of the will. It follows that in my finding, Thor Keng Seng and Thor Keng Hock were "lawful male issue" within the definition of the will.

A good deal of argument centred on the tombstone on which was engraved the names "Thor Keng Eow and Thor Keng Hong" under the heading grandsons and the name Thor Bean Choo under granddaughters. It was urged by Mr. Ong Huck Lim for Thor Keng Hong that the exclusions of their names must establish that they, Thor Keng Seng and Thor Keng Hock, were not intended to be beneficiaries under the will. Evidence was however given that the tombstone was erected shortly after the death of the testator's wife in 1934 and that all the names, including those of the grandsons and granddaughters were then inscribed therein. It was clear from their ages that in 1934-1935, Thor Keng Eow and Thor Keng Hong were yet to be born.

Thor Bean Choo, the only granddaughter named on the tombstone, was however born some 3 or 4 years previously. P.W.2 and P.W.3 both declared that at this time, neither Thor Teng Eng nor Thor Chye Huat had any sons born to or adopted by them living and that the testator chose two names, one for each son to give to his son if and when such a grandson should be born or failing such a birth, when a grandson would be adopted. This was said to be a Chinese custom but as a custom, it was hotly challenged by Mr. Ong Huck Lim. No expert evidence was called and no evidence of any sort was adduced on behalf of Thor Keng Hong in his challenge. Thor Keng Hong however suggested that his name was subsequently inscribed, i.e. after his adoption, as evidence by the last 'G' of his third name running on to the border of the tombstone. I do not think that the photograph of the tombsone can suggest such a contention. However, on other considerations it could be seen that Thor Keng Hong could not be correct. P.W.2 said that after the tombstone had been erected, the testator would not allow it to be disturbed by further inscriptions and that Thor Keng Hong's name and also Thor Keng Eow's name were put on before their birth and adoption. What he said is, in my view, the truth. If the testator wished to record the birth and adoption of all his grandchildren, so as to perpetuate their names, then it is not understood why Thor Guat Ee the natural daughter of Thor Chye Huat did not have her name inscribed under granddaughters — after her birth. The fact that her name was not must establish the truth of what P.W.2 said and also the fact that the exclusion of their names on the tombstone was not conclusive evidence against Thor Keng Seng and Thor Keng Hock.

Lastly, I do not think it necessary to allude to the challenge of P.W.1 as a witness of truth by reference to her opposition to the grant of letters of administration in the estate of Thor Teng Eng to Loh Ah Lian, except to say that at no stage in those proceedings had she contested the adoption of the two boys. She might have, for reasons that were personal but understandable, refused to recognise the grantee as the secondary wife of her husband. But Hepworth J. refused to revoke the grant, as is clear from the file, because a wrong procedure was adopted and because from a practical point of view, nothing was to be gained since the estate was insolvent. There was never at any time any decision on the question of adoption.

It now remains for me to interpret the will and provide answers to the questions asked. Mr. Ong Huck Lim contends for the interpretation that clause 6 operates only if Thor Keng Hong dies during the trust period and therefore does not operate since Thor Keng Hong is still alive. What operates, in his submission, is clause 9, under which since he survives to the end of the trust period, and can perform the duties of ancestral worship, Thor Keng Hong becomes the sole inheritor of the whole of the residuary estate. In the alternative, Mr. Ong Huck Lim suggests that Thor Teng Eng could only adopt one child for the purposes of inheritance and the residuary estate not be divided as to one-half to Thor Keng Hong and as to the other half to the lawful male child of Thor Keng Eng. On the other hand, Mr. Thillaimuthu suggests that clause 6 is the operative clause in the events that have happened and that in view of these events, the first and second provisoes to clause 6 and the whole of clause 9 do not operate.

After due consideration, I take the view that Mr. Thillaimuthu is right. Clause 6 is the residuary clause and by it, the residuary estate goes "to Thor Keng Hong and all the lawful male issue then living of my son Thor Teng Eng in equal shares." There are, as I have found, lawful male issue of Thor Teng Eng living at the expiration of the trust period. The first proviso is conditional upon Thor Keng Hong being then dead and there being no lawful male issue of Thor Teng Eng then living. Such conditions do not obtain and the proviso fails to become operational. The second proviso comes into effect if only Thor Teng Eng should die in the testator's lifetime or before the trust period ended, without leaving lawful male issue. Again, since Thor Teng Eng died with lawful male issue, the second proviso does not spring into existence.

Clause 9 refers to the event of the death of Thor Teng Eng and of all lawful male issue of Thor Teng Eng and Thor Chye Huat, in which case the surviving daughters were to adopt a male child each to the testator's sons to carry on the duties of ancestral worship and in consideration the male children so adopted would inherit the residuary. Needless to say, among the deaths contemplated was that of Thor Keng Hong, but since he is alive, the eventuality which is provided for by this clause similarly fails to arise.

In my view and with respect, the meaning of the will is so clear that there can be no other interpretation. Clause 6 in the light of the events that have happened is the operative residuary clause. Neither of the provisoes thereto nor clause 9 ever become operative. Under the main provisions of clause 6, Thor Keng Hong and all the lawful male issue of Thor Teng Eng take the residue in equal shares.

Miss Goh, counsel for the applicant, who entirely correctly, plays a neutral part in this application, was good enough to draw my attention to a wealth of cases on both sides of the line, which her industry has unearthed. They establish quite clearly that in the construction of wills there is a *prima facie* rule of distribution *per capita* and not *per stirpes* but this rule can be displaced where circumstances warrant a construction in favour of distribution *per stirpes*. With respect, I do not propose to refer to the cases, as in my view it is not necessary to resort to any rule of construction where the language used is so clear as not to be capable of another construction. The will was drawn by a qualified and experienced practitioner. Throughout there was no mention of *"per stirpes."* The ordinary and usual clause of *per stirpital* distribution, if such was the intention of the testator, would have been inserted. Its omission is, in my view, deliberate and intentional. The words used were "in trust for my grandson Thor Keng Hong and for all the lawful male issue then living of my son Thor Teng Eng in equal shares." The word "issue" was capable by clause 10 of importing the plural. In my

view on a proper reading, the will clearly specified for a *per capita* distribution.

The answers to the questions of the trustee are therefore these:

(a) Thor Keng Seng and Thor Keng Hock are the lawful male issue of Thor Teng Eng, within the meaning of clause 10 of the will and

(b) the nett residuary estate is to be divided among Thor Keng Hong, Thor Keng Seng and Thor Keng Hock equally.

I will now hear arguments as to costs.

Order accordingly.

Solicitors: *G. H. Goh & Co.; Ong Huck Lim & Co.; S. Thillaimuthu & Co.*

PUBLIC PROSECUTOR v. TAN ENG HOCK

[A.Cr. J. (Abdul Aziz J.) July 21, 1969]

[Kuala Lumpur — Criminal Appeal No. 36 of 1969]

Penal Code, s. 379 — Theft of motor car — Sentence — Principles guiding.

Criminal Law and Procedure — Sentence — Principles guiding — Sentence of binding over — Criminal Procedure Code (Cap. 6) ss. 173A & 422.

The respondent was charged with the theft of a motor car to which he pleaded guilty and on his plea he was convicted and bound over under section 173A of the Criminal Procedure Code (Cap. 6). The Public Prosecutor appealed.

Held, allowing the appeal: (1) an order of a binding over under section 173A of the Criminal Procedure Code after recording a conviction is illegal and the defect cannot be cured by section 422;

(2) having regard to the number of cases of car theft, a sentence of binding over is neither appropriate nor relevant enough. Sentence varied to 18 months' imprisonment.

MAGISTRATES' CRIMINAL APPEAL.

Mokhtar bin Sidin (Deputy Public Prosecutor) for the appellant.

Joginder Singh for the respondent.

Abdul Aziz J. (delivering oral judgment): The respondent was charged under section 379 of the Penal Code with theft of a motorcar valued at $4,800 belonging to one Yap Chai Leong. To that charge, he pleaded guilty and on his plea of guilty he was convicted and bound over under section 173A of the Criminal Procedure Code to be of good behaviour and to keep the peace for one year.

The facts of the case as given by the prosecuting officer are:

On 24th February 1969 at 7 p.m., the owner of the car, one Yap Chai Leong, parked his car in front of the Lido Cinema, Klang, to see a show. When he came out of the cinema, he found that somebody had stolen his car. He therefore lodged a report. On 29th March 1969, about a month after the theft of the car, the police laid an ambush near the Cathay Cinema. On the same evening, the accused was seen driving the stolen car. He was arrested and it was found that the car was carrying a false number plate.

The accused admitted the facts of the case. The learned trial magistrate in assessing sentence took into account the fact that the accused was a first offender and that he has a wife and a child and aged parents to support. He therefore bound the accused over under section 173A of the Criminal Procedure Code. Manifestly, an order of a binding over under section 173A of the Criminal Procedure Code after recording a conviction is illegal and the defect cannot be cured by section 422 of the Criminal Procedure Code as urged by the respondent's counsel. The order of binding over must, therefore, be quashed.

Having quashed the sentence, what is the appropriate sentence to be imposed by this court? I am aware that in considering the appropriate sentence the court should always be guided by certain principles: the first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing a crime but also of preventing it. In fixing sentence, the nature and the circumstances and the degree of deliberation must be taken into account. When there is no deliberation and the accused has a good record of antecedent, age and character, a bond would be justified. Apart from the fact that respondent is a first offender, there are no mitigating factors in the case. The accused was 28 years of age at the time of the commission of the offence. The fact that he was arrested a month after the offence was committed and that he had changed the number plate shows that this was a deliberate act and not an impulsive act of bravado. Car theft is a fairly common offence and invariably it leads to more serious crimes. It is manifest, having regard to the number of such cases, that a sentence of binding over is neither appropriate nor relevant enough. The appeal is, therefore, allowed and the sentence shall be varied to 18 months' imprisonment.

Appeal allowed.

Solicitors: *Joginder Singh & Co.*

ALI AMBERAN v. TUNKU ABDULLAH

[O.C.J. (Raja Azlan Shah J.) January 9, 1970]

[Kuala Lumpur — Election Petition No. 6 of 1969]

Elections — Election handbills — Causing to be printed election handbills or advertisements which do not bear name and address of printer — Whether candidate liable for acts of members of political party setting up candidate — Extended scope of agency — Corrupt practices — Election Offences Act, 1954, (Revised 1969) ss. 3(m) & 11(1)(c).

Agency — Extended scope of — Election law — Acts of members of political party.

The petitioner sought to avoid an election on 3 grounds: (1) corrupt practice was committed in causing to be printed election handbills or advertisements without the name and address of the printer; (2) illegal practice was committed in